NO. 4481

United States Court of Appeals

FOR THE

NINTH CIRCUIT

FRANK C. BERTELMANN,

Petitioner-Appellant,

vs.

MARY N. LUCAS, et al,

Respondents-Appellees.

REPLY BRIEF

On Behalf of Respondents John C. Lane and Noa W. Aluli.

Upon Appeal from the Supreme Court for the Territory of Hawaii.

NOA W. ALULI,
in propria persona,
and for Respondent
JOHN C. LANE.

Filed this.....day of.....,
1925.

F. D. MONCKTON, Clerk,

By ....., Deputy Clerk.

SUBJECT INDEX

No. 4481

United States Court of Appeals

FOR THE

NINTH CIRCUIT

FRANK C. BERTELMANN,

Petitioner-Appellant,

vs.

MARY N. LUCAS, et al,

Respondents-Appellees.

REPLY BRIEF OF RESPONDENTS LANE AND ALULI.

Upon Appeal from the Supreme Court for the Territory of Hawaii.

I.

STATEMENT.

a. Petitioner alleges he was in a great need of $40,000.00 with which to make the payments prescribed by the conditions of the will—"if he should fail to make the payments he would lose his rights granted by his father's will to acquire an estate for $40,000.00, worth at that time at least $800,000.00 and more nearly $1,250,000.00." (Tr. p. 34.)

b. Petitioner alleges:

He did not have the $40,000.00.

He was one year trying to raise the $40,000.00 and failed.

He applied to Respondent Lane for assistance and after "endeavoring to get various persons to lend the money to your petitioner," he, too, failed to raise the much needed $40,000.00. (Tr. pp. 28-29.)

c. Petitioner alleges that Respondent Aluli "undertook to obtain the $40,000.00" and he (Aluli) succeeded with Respondent McCandless. (Tr. p. 29.)

d. Petitioner alleges that on October 30, 1916, he entered into an agreement with Respondents Lane and Aluli, because Aluli had secured the tendering $40,000.00, and because Lane and Aluli were to be his counsel and representative to recover the land herein in all the courts of the Territory and in this Honorable Court, to convey a two-ninths interest in said land to them. On November 22, 1916, petitioner executed the deed in conformity with the agreement. (Tr. pp. 29, 30, 31, 32, 33, 41.)

e. Petitioner alleges "in compliance with the conditions of the will" the tendering of the said $40,000.00 must be done on October 31, 1916, or lose his right to own property worth $1,250,000.00. (Tr. pp. 11, 12.)

f. Petitioner alleges that a valid tender was made on his behalf by Respondent Aluli. (Tr. p. 38.)

g. Petitioner admits and alleges "he has been without money and has had to borrow from said McCandless to live on." (Tr. p. 43.)

h. On September 17, 1917, nearly one year after the tendering had been made, and after the said agreement and said deed were executed, petitioner alleges he wrote through his attorney, W. J. Robinson, demanding these respondents to re-convey the said two-ninths interest which he had on November 22, 1916, conveyed them, charging "connivance, misrepresentation, fraud and deceit." (Tr. pp. 42, 43.)

i. About three months after the said letter of petitioner by W. J. Robinson was written, on January 10, 1918, petitioner concluded that Respondents Aluli and Lane were not bad men, did not do harm, but rendered him good and valuable services, and were his friends, for these respondents, with him, joined as co-plaintiffs in the ejectment suit for said land against Respondent Mary N. Lucas, et al. (Tr. p. 44.)

j. Petitioner alleges that in said ejectment suit E. C. Peters (now Chief Justice of the Supreme Court of Hawaii) was the attorney for Respondent McCandless and himself; that Respondent Aluli broke the said agreement in not appearing as his lawyer.

In re his disqualification in this case Peters said, as follows:

"In or about the month of January, 1917, L. L. McCandless, one of the respondents in the above entitled matter, retained declarent generally to estab-

lish, settle and protect all the right, title, interest and estate acquired by the complainant Frank C. Bertelmann." "That pursuant to and in compliance with said retainer, declarent as the attorney for the said Frank C. Bertelmann and the said L. L. McCandless instituted in the Circuit Court of the Fifth Judicial Circuit an action at law in ejectment for the restitution of the lands referred to in Paragraph 21 of complainant's amended bill." (Tr. pp. 44-45, 123, 124, 125.)

k. Petitioner alleges that Lane and Aluli rendered services and that he will pay for their services in the following language: "Petitioner offers to do equity, to pay said Noa W. Aluli the reasonable value of his services rendered, which he prays the Court to ascertain after hearing. And if this is not sufficient offer to do equity, petitioner here now offers to do whatever the Court may, upon hearing, find to be equitable and right in the premises to said Aluli and said Lane and each of them." (Tr. p. 38.)

l. Petitioner says that through fraud he conveyed to Aluli a one-ninth interest in the said land. (Petitioner's ~~typewritten~~ brief, page ~~6.~~ 8.)

m. On October 24, 1922, petitioner filed this bill and amended bill charging fraud and breach of contract against these respondents. The "summarized" of the typewritten brief of petitioner on page 88 charges want of consideration also. (Tr. pp. 2-88.)

n. These respondents and all the other respondents demurred upon several grounds. (Tr. pp. 113-115.)

o. The Supreme Court sustained the demurrers because of multifariousness and petitioner has full and adequate relief at law. (Tr. p 132; Tr. pp. 132-172.)

p. Petitioner appeals from this decision of the Supreme Court. (Tr. p. 180.)

q. TO AVOID REPETITIONS THESE RESPONDENTS WILL PRESENT AND DISCUSS BUT THREE OF THEIR SEVEN GROUNDS OF DEMURRER, AS HEREUNDER SET OUT.

II.

BRIEF OF THE ARGUMENT.

a. Demurrer will be sustained where the allegations of the bill are inconsistent.

b. Where no fraud was practiced by the attorney on the client in obtaining a deed to a two-ninths interest in the land to be recovered for his services—the attorney rendering services by securing $40,000.00 with which to make the tender to begin litigation for the recovery of said land—spent two days in making and did make a good and valid tender—joined with the client who was at that time represented by another attorney in the ejectment suit for said land, equity will not set aside said deed nor declare it a mortgage.

c. Where the attorney is prepared, ready, willing and anxious to represent the client in all courts according to the contract so to do—the client displaces

him through no fault of his, and is represented by another, equity will not disturb the deed conveying an interest in the land for his services in all courts.

III.

ARGUMENT.

(A)

A BILL ALLEGING INCONSISTENT FACTS IS DEMURRABLE.

The letter by W. J. Robinson, attorney for Petitioner, to these Respondents demanded a re-conveyance and charged connivance, deceit, misrepresentation and fraud. Very soon thereafter the Petitioner "took back" all the bad things he had said about these Respondents and did not want a re-conveyance when he joined with these Respondents as co-plaintiff in the ejectment suit against Mary N. Lucas et al. Inconsistency—is plain.

We respectfully submit, the Bill of Petitioner is inconsistent and therefore demurrable.

(B)

NO FRAUD—NO RELIEF.

To secure $40,000.00 under the circumstances of this matter, is not an every day occurrence.

Respondent Lane performed services for Petitioner. Respondent Aluli got the $40,000.00 and as admitted by Petitioner, he made a good and valid tender. Aluli made it possible for the Petitioner to

have his day in court. Without the services of Aluli, Petitioner, as admitted by him, would have lost an estate worth $1,250,000.00.

The deed sought to be set aside or to be declared a mortgage refers to the agreement and is therefore based upon it. The same two-ninths interest in the agreement is the same two-ninths interest in the deed. The deed does not give a bigger interest to these Respondents for their services. The Petitioner has not alleged that these Respondents were paid for their services nor has he alleged that they were to receive less or any portion of the two-ninths interest. His silence in this regard proves that it was agreed, understandingly and knowingly, between Respondents and Petitioner, that they receive and have a two-ninths interest, and so agreeing, it was put in the agreement and later in the deed. Respondents, and more particularly Respondent Aluli, is not a fool to go into a protracted land litigation without having his fee decided upon.

There might be some room for argument against these Respondents if the Petitioner had not spent one year in pondering over this estate and in trying to raise the $40,000.00; but having spent all this time, thinking over it for one year, it is respectfully submitted, Petitioner had all his faculties, knew well what he was doing, and was a happy man when he signed the agreement and deed.

Having in mind the value of the land involved, the work and the nature of the work performed and to

be performed in all of the courts of the Territory and in this Honorable Court, to the end that Petitioner might recover this "million-and-a-quarter estate," we respectfully submit, the two-ninths interest to these Respondents or the one-ninth interest claimed by Petitioner's brief, as Aluli's share, was and is not a hard bargain, was and is not unconscionable.

It is respectfully submitted, there is no fraud. The alternative prayer of the Petitioner that the said deed be declared a mortgage in the event it is not set aside for fraud, negatives and refutes the charge of fraud. Petitioner, knowing there was no fraud and no undue advantage taken over him, is willing to have the deed declared a mortgage for what the courts may decide to be the reasonable amount for the services of Respondents up to the time of the filing of said ejectment suit, which, therefore, admits by inference that the contract entered into was above board and not tainted with fraud, which, therefore, admits by inference that he did agree to give the two-ninths interest to Respondents, but since Aluli did not appear as his attorney in the ejectment suit, they (Aluli and Lane) should receive less, and as security he offers a mortgage.

Again, where is the fraud when Petitioner admits that Respondents are entitled to some remuneration, for, then, it means that these Respondents and Petitioner had amicably agreed upon a definite figure for a certain amount of work, and when, as claimed by Petitioner, the alleged breach occurred, he

(Petitioner) now agrees to pay for the services up to the time of the alleged breach. If there was fraud, the Petitioner would never consent that these Respondents be paid.

(C)

NO BREACH—NO RELIEF.

Petitioner on page 37 of the transcript alleged "that the consideration of the conveyance of the interest to said Noa W. Aluli was the services he had *theretofore* performed and the services he agreed to perform *thereafter,* and in so far as the consideration for services *thereafter* to be rendered, he has wholly failed," meaning that the services *thertofore* or the services before the ejectment suit, were performed according to the said agreement, but that as to the services *thereafter* or after the ejectment suit was filed, Respondent Aluli, because he did not appear as counsel for Petitioner, thereby broke the said agreement. Where is the "want of consideration" when Petitioner admits Aluli did work *theretofore,* and as to the services *thereafter,* Aluli, although displaced by Petitioner, rendered this in an indirect way by representing himself and by acting as the attorney for Lane, since their interests (Petitioner's, Lane and Aluli) were and are the same.

We submit the breach was caused by Petitioner because together with McCandless he and they wanted to get another lawyer, which lawyer was E. C. Peters, now Chief Justice of Hawaii.

Petitioner did not allege that Aluli would not or had refused to act as his attorney. It is apparent that Petitioner went in with Respondent McCandless (who had produced the $40,000.00 and who had been lending him money, which is but the natural thing for him to do) and employed E. C. Peters. The case was taken out of the hands of Aluli by Petitioner, and the delay, if any, cannot be attributed to him.

Did E. C. Peters in January, 1917, enter the services of Petitioner without his consent and approval? No. Petitioner was happy when Peters was enrolled on his behalf. Petitioner has alleged that he was and is a poor man—that McCandless was and is rich, and he employed Peters for him (Petitioner); therefore, we contend, he was satisfied and contented when through McCandless (McCandless who produced the $40,000.00) he obtained the services of E. C. Peters, one of the leading attorneys of Hawaii. The appointment of Mr. Peters to be Chief Justice of Hawaii bars all thoughts that he was not acceptable to Petitioner and confirms our contention that Petitioner was a happy man when Mr. Peters was secured as his attorney. Chief Justice Peters has declared that he was the attorney for the Petitioner and we submit the Petitioner cannot deny it. We submit that E. C. Peters was the attorney for Petitioner in January of 1917—was his attorney from that time on up to the time of the filing of said ejectment case —was his attorney when the said case was filed and was his attorney during the years which followed the

filing of said suit up to the time of his appointment to the bench. Petitioner cannot now be heard to say that the breach was caused by Aluli after being silent for nearly six years from January, 1917, to October, 24, 1922. The silence of Petitioner for six years confirms our contention that he displaced the services of Aluli for Peters.

It is apparent Aluli was displaced by Petitioner; still, at the same time, Petitioner retained the services of Aluli in that, being co-plaintiff, to protect his (Aluli's) rights and interests, he (Aluli) had to get in and work also. Where is the loss to Petitioner when instead of having one lawyer, he, because of the appearance of Peters, had two.

It is also apparent that Aluli is not a fool to throw up the case and break the contract when more than half of the work was done and when the remaining work was simply a question of law, whether or not a proper tender had been made by him.

Petitioner charged Respondent Aluli (on pages 37 and 38 of the transcript) to be incompetent—he (Aluli) should have tendered the $40,000.00 to the ex-officio clerk of the court and should have asked equity to advise how and to whom the tender should be made—he (Aluli) "killed time hunting Mary N. Lucas, who was in hiding to avoid tender after having made a valid and legal tender to her agent." In reply Aluli submits his record in this Honorable Court in cases numbered 3099 and 3361, where, approving the arguments of Attorney Noa W. Aluli, this Honorable Court sustained the decision of the

Supreme Court of Hawaii and where, approving the arguments of Attorney Noa W. Aluli, this Honorable Court reversed a unanimous decision of the Supreme Court of Hawaii. And in further reply Aluli contends: there is no provision in the Statutes of Hawaii authorizing the placing of money such as this in the hands of the ex-officio clerk of court and there is no provision to exact a bond from the clerk whereby this large sum of $40,000.00 would be protected from burglars or thieves. Why go to equity to ask questions when it was impossible as there were only two days remaining to make the tender? Why ask equity when the direction of the will is specific?

We respectfully submit there was no breach on the part of these Respondents, that the breach was on the part of the Petitioner and for which Respondents should not suffer.

IV.

CONCLUSION.

It is respectfully submitted, the Petitioner should confine and limit his present activities towards these Respondents and Respondent McCandless by filing a non-demurrable bill (if he can) and should he prevail (we claim he cannot), then to proceed alone in the said ejectment suit against Mary N. Lucas et al; should he fail and should the courts find there was no fraud and no breach of contract, then Petitioner should again "make up" with these Respondents and all together proceed with the said ejectment case. The present attitude of Petitioner in joining Respon-

dents with Respondents Mary N. Lucas et al., is multifarious.

From all of the foregoing, also, we submit the decision of the lower court be sustained.

NOA W. ALULI, in propria persona,
and as Attorney for Respondent
JOHN C. LANE.

Dated, Honolulu, T. H., April 3, 1925.